

July 1, 2014

Jannie L. Quinn
City Attorney
City of Mountain View
500 Castro Street
Mountain View, CA 94041

Re: Your Request for Advice
Our File No. A-14-106(b)

Dear Ms. Quinn:

This letter responds to your request for advice on behalf of Mountain View City Councilmember John Inks regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ In expediting our responses to your questions we divided your three questions, as requested, into two advice responses. This letter addresses the second and third questions that you raised about amendments to the existing San Antonio Precise Plan (“Existing Precise Plan”) and the Merlone Geier Phase II Development Project (“MG Project”).

Please note, the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Moreover, our advice is limited to the provisions of the Act. Nothing in this letter should be construed to be advice on past conduct.

QUESTIONS

1. Can Councilmember Inks make, participate in making, or influence governmental decisions regarding the proposed MG Project?
2. Can Councilmember Inks make, participate in making, or influence governmental decisions regarding the proposed amendment to the Existing Precise Plan?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

1. No. As discussed below, Councilmember Inks has a conflict of interest and may not make, participate in making, or influence the decisions concerning the MG Project. Moreover, when the item is called for at a noticed public meeting, Councilmember Inks must: (1) immediately prior to the discussion of the item, orally identify his economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself; and (3) leave the room for the duration of the discussion and/or vote on the item.

2. No. Based on the facts provided, the proposed amendment to the Existing Precise Plan is inextricably interrelated to the decisions regarding the proposed MG Project. These two decisions are interrelated because the proposed amendments to the Existing Precise Plan is a necessary prerequisite to the approval of the MG Project and will effectively determine, affirm, nullify, or alter the result of that project.

FACTS

Councilmember Inks is a member of the Mountain View City Council and owns a condominium in a condominium project or common interest development in Mountain View located on Showers Drive. His unit is northeast of the boundary of the Existing Precise Plan area.

On July 1, 2014, the City Council will consider whether to approve the MG Project, a proposed project that would redevelop a portion of an existing shopping center located in the Existing Precise Plan. The current site consists of 9.9 acres of the 56-acre shopping center with 1- to 2-story restaurants and retail stores such as Wal-Mart, Trader Joe's, Jo-Ann Fabric, Craft, Kohl's, Safeway and BevMo!.

The MG Project, according to the draft and final Environmental Impact Report² ("EIR") which you refer to in your request, would require a 28-month construction period and the demolition of the existing commercial and retail buildings in the retail center. Those structures would be replaced with six blocks of office, commercial, retail, hotel, cinema, restaurant, and parking spaces. The new 2-to 6-story buildings would feature clear glass, natural stone, and architectural metal panels. In addition, the project site would include a promenade between the east and west blocks that would extend from California Street to the existing Hetch-Hetchy Parkway. The tree-lined promenade would include parking, monument signage, sidewalks, planters, a plaza, benches, outdoor dining tables, lounge chairs, sofas, and cabanas.

The MG Project would replace the existing 59,655 square feet of commercial and retail buildings and associated parking with approximately 1.1 million square feet of mixed-use development consisting of office, commercial, hotel, retail, cinema, and restaurant space.

² "Village at San Antonio Center Phase II Project" Draft Environmental Impact Report, March 2014; and Final Environmental Impact Report, June 2014, prepared for the City of Mountain View by IFC International.

As proposed, it would include the following:

- 107,835 square feet of commercial retail and restaurant space;
- 49,751 square foot cinema;
- 360,909 square feet of office space;
- 393,914 square foot parking garage;
- 128,642 square foot, 167-room hotel;
- 39,816 square feet of retail building services.
- 1,080,867 total square feet of mixed-use development.

The Project site is bound by Pacchetti Way to the east, the Hetch-Hetchy Parkway to the south, San Antonio Road to the west, and California Street to the north. Vehicular access to the MG Project site would be via Pacchetti Way, California Street, and San Antonio Road. These streets merge onto Showers Drive, where the Councilmember owns a condominium.

Prior to the decision to approve the MG Project, the city council will consider whether to amend the Existing Precise Plan boundaries to remove the MG Project site from the plan. The amendment to the Existing Precise Plan would create a separate zoning area called a Planned Community District (“District”). The new zoning rules will only be applicable to the MG Project site. After a decision is made whether to amend the Existing Precise Plan, the city council would consider whether to approve the MG Project as a separate decision.

Councilmember Inks’ condominium unit, which is on Showers Drive, is located 607 feet from the closest boundary of the Existing Precise Plan and 1,045 feet from the MG Project site under consideration.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Your letter eliminates the need to analyze the initial steps of the standard analysis. The Councilmember is a public official and you are asking whether he may make or participate in making decisions to amend the Existing Precise Plan and the MG Project in light of the fact that he owns and resides in a condominium unit within 607 feet and 1045 feet respectively from each of the project boundaries.³

³ As you noted in your letter, Regulation 18705.2(d)(4) now provides that the real property in which an official has an interest “does not include any common area as part of the official’s ownership interest in a common interest development...”

Regulation 18705.2 provides in relevant part:

“(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(13)) on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

...

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official’s real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

...

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.”

Your facts implicate these two subdivisions. These subdivisions focus on the effects on the official’s interest emanating from the project site.

Subdivision (a)(10) considers impacts to the character of the property. *Distance is not determinative with respect to this test.* You noted that Councilmember Inks’ condominium is “separated from the shopping center by a residential development which provides a visual buffer” and his view is “not directly impacted by the proposed redevelopment.”

You also indicate that a parking study prepared as part of the EIR for the MG Project indicates that while the “redevelopment intensifies the existing commercial and retail uses on the site, traffic studies indicate the only significant traffic impact will be a substantial increase in vehicle delay or deterioration at the intersection of San Antonio Road and the main transportation corridor of El Camino Real...”

Lastly, you state that because of the distance and buffers between the MG Project and Councilmember Inks’ property, it does not appear there will be significant noise, odor, privacy, or parking concerns.

While the immediate vicinity of the Councilmember’s condominium may not experience direct impact or dramatic change due to the project, we note that the EIR you reference also

noted substantial and significant changes to the surrounding area—the increased intensity and expansion of use, the density of the development, the increased overall traffic, and prolonged construction period—that would affect the market value of real property in the area.

These factors suggest a foreseeable material financial effect under subdivision (a)(10).

However, even assuming that subdivision (a)(10) is not triggered, under the general test of (a)(12), it appears that the proposed MG Project would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its *reasonably foreseeable* effect would influence the market value of the official's property.

Regulation 18706(b) defines foreseeability as follows:

“A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.”

Regulation 18706 provides factors to consider in determining whether a decision in which an official's interest is not explicitly involved will have a reasonably foreseeable financial effect on the interest nonetheless:

(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

Here the financial effect does not appear to be contingent upon intervening events by any agency other than the city. The city must decide upon whether to approve the project. It is not anticipated that the city would make any further decisions on this matter. This factor supports the conclusion of a conflict of interest.

(2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

In the past, we have found that the anticipated positive financial effect of redevelopment is intended to increase property values, improve the business climate within the project area, and provide benefits to the community as a whole. The very nature of redevelopment projects has led the Commission to find that it is reasonably foreseeable that there will be a financial effect on real property values and business interests located within or near project areas. (In re Oglesby (1975) 1 FPPC Ops. 71, Advice Letters to Haight, No. A-81-509, and Phillips, No. A-

87-166. See also Downey Cares v. Downey Community Development Commission (1987) 196 Cal.App.3d 983, 991.)

In this case, the MG Project could result in approximately 1.1 million square feet of mixed used development consisting of six blocks of office, commercial, retail, hotel, cinema, restaurant, and parking spaces. This development would be constructed approximately two-tenths of a mile from the Councilmember's condominium. The change in intensity and density of use should create an expectation that there will be a financial effect on the official's home. This factor supports the conclusion of a conflict of interest.

(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.

The value of residential property within close proximity to the project will likely be affected by the development. As discussed above, the very nature of development projects likely results in positive financial effects on real property values and business interests located within or near the project area as the result of the redevelopment project. (DeSaulnier Advice Letter, No. A-96-361.) This factor supports the conclusion of a conflict of interest.

(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's economic interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

There is insufficient evidence to establish that bias can be inferred. Although the MG Project will not likely affect the Councilmember's use and enjoyment of his condominium, the financial effects on the value of his property could be significant creating at a minimum an appearance of bias.

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.

This factor does not apply to the facts in this case.

(6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.

See discussion in numbers 2-4 above.

Consequently, absent an exception, Councilmember Inks may not participate⁴ in the MG Project decision.

Segmentation and Interrelated Decisions:

Generally, decisions are analyzed independently to determine if there will be a foreseeable material financial effect on an official's financial interest.

For example, we have advised that under certain circumstances, some large, complex decisions may be divided into separate decisions so that even if an official has a disqualifying interest in one component of the series of decisions, he may still participate as to the other components in which he has no financial interest. (*Milich* Advice Letter, No. I-04-216; *Merkuloff* Advice Letter, No. I-90-542.)

However, certain decisions are too interrelated to be considered separately. In that event, a public official's conflict of interest on one decision will be disqualifying for the other decision as well. Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. Thus, a public official must disqualify himself or herself if the result of one decision will effectively determine or nullify the result of another.

Regulation 18709 provides that for segmentation to be permitted, all of the following must apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

⁴ Please note that a public official who has a conflict of interest in a decision noticed at a public meeting, must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed door sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulations 18702.5(c) and 18702.5(d) apply.

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Based on the facts you have provided, the proposed amendment to the Existing Precise Plan is inextricably interrelated to the decisions regarding the proposed MG Project. The city council meeting agenda for July 1, 2014 indicates that the MG Project “requires a P District zoning since the project while consistent with the General Plan, does not conform to the [Existing Precise Plan] for intensity (of uses) and heights (of commercial buildings).” For instance, the “existing Precise Plan allows residential buildings and hotels up to 80’ or seven stories. The applicant proposes hotel heights of 90’.” Therefore, an amendment to the Existing Precise Plan “is required to remove the project site from the Plan Area” to provide it with separate zoning and for the project to move forward.

These two decisions are interrelated because the proposed amendments to the Existing Precise Plan is a necessary prerequisite to the approval of the MG Project and will effectively determine, affirm, nullify, or alter the result of that project. Thus, because the council member has a conflict of interest with respect to the MG Project decisions, he will also have a conflict of interest with respect to the proposed amendments to the Existing Precise Plan and will not be able to participate in this interrelated decision.

Future implementation decisions concerning the development may be severable. You may wish to contact us for further advice as the project progresses.

Exceptions:

An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception when the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public. (Section 87103; Regulations 18700(b)(7) and 18707(a)).

The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; Regulation 18708.) You have presented no facts indicating that either of these exceptions applies.

Finally, we note that the Act does not prohibit public officials from representing their personal interests in their private capacity. Regulation 18702.4(b)(1) states that even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent

himself or herself on matters related solely to his or her interest in real property which is wholly owned by the official or members of his or her immediate family. Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

Under this exception, the official must limit their comments to their personal interests and make clear that they are not speaking in the interest of any person or group, nor are they acting in their official capacity. (*Mitchell* Advice Letter, No. A-12-011.) Similarly, they may not discuss the decision with other council members or consultants outside of public comments made at any public meetings.

Finally, we note that a public official is not attempting to use his or her official position to influence a governmental decision of an agency if the official communicates with the general public or the press. (Regulation 18702.4(b)(2).)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl